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It is well settled to-day that after-acquired rolling stock may be mortgaged, although the reasoning employed by the different courts is by no means uniform.<sup>13</sup> The question of potential existence is seldom raised about mortgages upon cars and locomotives, but when it is brought up squarely the courts seem to find little difficulty in discovering a way to protect the rights of the mortgagee.<sup>14</sup> When the mortgagee's claim to the after-acquired rolling equipment is contested by one asserting a vendor's lien or reserving title to the cars and locomotives under a conditional sale, the rights of the mortgagee are usually deemed inferior to those of the contestants because a mortgage covering after-acquired property attaches only to whatever interest the mortgagor acquires, and the property has come to him charged with the lien of the vendor.<sup>15</sup> Furthermore, it is a general rule of railroad law that expenses attending the operation of a railroad may constitute a first claim upon the property of the company, superior even to the rights of mortgagees,<sup>16</sup> and by analogy it seems that this rule should be applied to mortgages of rolling stock.

**CONSTRUCTIVE TRUSTS ARISING FROM CONFIDENTIAL RELATIONS.**—According to a few text writers and some courts, the essential element of a constructive trust is fraud. It is urged that if this element be lacking, a true constructive trust cannot arise; and that to hold otherwise would be virtually to abrogate the Statute of Frauds and allow title in land to be disturbed upon parol evidence.<sup>1</sup> Some of the courts, because of their close adherence to this narrow principle, insist that the fraud must appear in the original transaction and be the means by which the conveyance of title was secured.<sup>2</sup> The inequitable consequences of the strict enforcement of such a harsh rule resulted in the invention of the fiction of constructive fraud in order that justice might be realized. Thus it was reasoned that the betrayal of con-

<sup>13</sup>Philadelphia etc. R. R. v. Woelpper (1870) 64 Pa. 366; Morrill v. Noyes (1863) 56 Me. 458; Pennock v. Coe (1859) 23 How. 117; Scott v. Clinton etc. R. R. (C. C. 1876) 6 Biss. 529; Phillips v. Winslow (Ky. 1857) 18 B. Monroe 431.

<sup>14</sup>Philadelphia etc. R. R. v. Woelpper, *supra*; Morrill v. Noyes, *supra*. When the instrument mortgaging after-acquired property is confirmed expressly by the legislature, the mortgage is valid regardless of the question of potential existence. Howe v. Freeman (Mass. 1860) 14 Gray 566.

<sup>15</sup>United States v. New Orleans R. R. (1870) 12 Wall. 362; Newgass v. Atlantic etc. Ry. (C. C. 1893) 56 Fed. 676.

<sup>16</sup>See 1 Elliott, Railroads (2nd ed.) § 580; Newgass v. Atlantic etc. Ry., *supra*; Meyer v. Johnston, *supra*. It has been held that the claims of mortgagees may be subordinated, by a judicial decree, to a new lien created by order of the court to secure new loans necessary for the continuation of traffic on a dilapidated railroad, either with the consent of the mortgagee, or without it. See cases cited in Meyer v. Johnston, *supra*, pp. 341, 338; Stanton v. Alabama etc. R. R. (C. C. 1875) 2 Woods 506.

<sup>13</sup>Pomeroy, Eq. Jur. (3rd ed.) §§ 1044, 1046, 1056; Noe v. Roll (1892) 134 Ind. 115; Davis v. Stambaugh (1895) 163 Ill. 557; Barry v. Hill (1895) 166 Pa. 344.

<sup>14</sup>Brock v. Brock (1890) 90 Ala. 86; Clester v. Clester (1913) 90 Kan. 638.

fidence raised the presumption of fraud *ab initio*,<sup>3</sup> and it was also declared that the fraudulent use of property was the same as an original deception.<sup>4</sup> This theory of *prima facie* fraud was received with favor by the courts in the cases of betrayal of confidence in transactions between relatives, particularly husband and wife.<sup>5</sup> It was felt that in the case of husband and wife there existed a semi-fiduciary relation,<sup>6</sup> and that the same strict rules which control an attorney because of his superior knowledge, and the confidence reposed in him by his client, were equally applicable to transactions between them.<sup>7</sup>

The recent case of *Miller v. Miller* (Ill. 1915) 147 N. E. 821, admirably illustrates the endeavor of the courts to protect business transactions between husband and wife. In this case, a wife gave an absolute deed of conveyance of her property to her husband in order to assist him in a business venture, being assured by him that he would reconvey to her when he had established his business credit and that in the meantime her interests would be protected. Before making a reconveyance the husband died and his heirs claimed a share in the property, setting up the Statute of Frauds to defeat the parol trust in favor of the widow. The court held that because of the confidential relations existing between the parties, there was a constructive trust, and the decision seems to indicate that fraud is not necessary to the creation of a constructive trust, although it is also intimated that the case might be brought within the class of constructive fraud. The decision is a just one, and is in keeping with a commendable practice of specially guarding the interest of the weaker party in transactions where the usual business precautions are not employed because of confidential relations.<sup>8</sup> There is a great danger, however, of confusion arising if a general rule should be adopted that confidential relations alone would be sufficient to raise a constructive trust, for there seems to be no uniformity of decisions as to what constitutes confidential relations. For instance, the courts regard as confidential, business

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<sup>3</sup>*Koefoed v. Thompson* (1905) 73 Neb. 128, 133; *Giffin v. Taylor* (1894) 139 Ind. 573.

<sup>4</sup>*Kimball v. Tripp* (1902) 136 Cal. 631.

<sup>5</sup>*Pollard v. McKenney* (1903) 69 Neb. 742; *Goldsmith v. Goldsmith* (1895) 145 N. Y. 313; *Cardiff v. Marquis* (1908) 17 N. Dak. 110.

<sup>6</sup>The fiduciary relation does not need to be a legal one; it may be moral, social, domestic or personal. See *Huffman v. Huffman* (1905) 35 Ind. App. 643. These rules of fiduciary relations apply to transactions between parent and child even though the transaction be not strictly fiduciary. *Wood v. Rabe* (1884) 96 N. Y. 414; but see *Gregory v. Bowlsly* (1902) 115 Iowa 327. But there must be affirmative proof of undue influence, for it will not be presumed that a parent will defraud his child. *I Perry, Trusts* (6th ed.) § 201.

<sup>7</sup>*Darlington's Appeal* (1878) 86 Pa. 512. An attorney who purchases title adverse to his client by taking advantage of knowledge he obtained as attorney, will be held to be a constructive trustee even though he made the purchase after the termination of his services. *Downard v. Hadley* (1888) 116 Ind. 131; *Henry v. Raiman* (1855) 25 Pa. 354; see *Ainsworth v. Harding* (1912) 22 Idaho 645.

<sup>8</sup>*Wood v. Rabe, supra*; *Walker v. Walker* (1901) 199 Pa. 435; *Bohm v. Bohm* (1885) 9 Colo. 100; but see *McGinnis v. McGinnis* (1913) 159 Iowa 394, citing no authorities. In California, the relations between husband and wife are declared by statute to be confidential. See *Jackson v. Jackson* (1892) 94 Cal. 446.

relations between brother and sister,<sup>9</sup> but not between brothers;<sup>10</sup> between father-in-law and son,<sup>11</sup> but not between mother-in-law and son;<sup>12</sup> between co-owners,<sup>13</sup> but not between mining partners.<sup>14</sup>

It is evident from a study of the cases in which the courts have resorted to the fiction of constructive fraud, that they would prefer to discard altogether the old narrow rule requiring fraud as an element of constructive trusts, and that they have endeavored to establish a broader rule allowing a constructive trust to arise in any case where a person obtains a legal title by virtue of a confidential relation under such circumstances that he ought not to retain the beneficial interest.<sup>15</sup> This equitable principle might have been established earlier on more simple and sane premises, if the courts had originally understood the theory underlying trusts arising by "operation of law" as provided for in the Statute of Frauds. The failure to understand the theory was due to their confusing specific performance of express trusts with restitution in constructive trusts because of the mere accident that, in most cases, both afforded the same relief.<sup>16</sup> The true principle which should govern constructive trusts is that of unjust enrichment, as it does in contracts arising by operation of law.<sup>17</sup> If this theory had been understood and applied there would have been no necessity of resorting to legal fictions or of creating new rules which might lead to confusion, for in cases where it could be shown that to allow the defendant to retain title would unjustly enrich him at the expense of the plaintiff, it would be decreed that the property be restored. Such a principle, furthermore, would not abrogate the Statute of Frauds nor endanger the security of titles in property any more than quasi-contracts destroys the principle of true contracts.

RATE REGULATION OF PUBLIC SERVICE COMPANIES BY MUNICIPAL CORPORATIONS.—It is a well established principle of our law that the legislative branch of the government is vested with power to regulate

<sup>9</sup>Goldsmith *v.* Goldsmith, *supra*; Noble *v.* Noble (1912) 255 Ill. 629.

<sup>10</sup>Hamilton *v.* Buchanan (1893) 112 N. C. 463. This was the case of an insane brother, in which it was held that there were no confidential relations unless a fraudulent advantage had been taken in reference to the particular sale. See Pierce *v.* Pierce (1885) 55 Mich. 629, 637.

<sup>11</sup>Bowler *v.* Curlier (1891) 21 Nev. 158.

<sup>12</sup>Barnes *v.* Taylor (1876) 27 N. J. Eq. 266.

<sup>13</sup>Koefoed *v.* Thompson, *supra*.

<sup>14</sup>Bissell *v.* Foss (1885) 114 U. S. 252. Other relations considered confidential, are stepfather and stepdaughter, see Newis *v.* Topfer (1903) 121 Iowa 433, grandfather and minor grandson, Roggenkamp *v.* Roggenkamp (C. C. A. 1895) 68 Fed. 605, aunt and niece, Butler *v.* Hyland (1891) 89 Cal. 575, nephew and uncle, Ward *v.* Conklin (1908) 232 Ill. 553, priest and parishioner, see Henderson *v.* Murray (1909) 108 Minn. 76.

<sup>15</sup>I Perry, Trusts (6th ed.) § 166. But the mere reposing of confidence is not enough to raise a trust, however dishonorable the violation of such confidence may be. Patten *v.* Warner (1897) 11 App. D. C. 149.

<sup>16</sup>See article by Professor J. B. Ames entitled "Oral Trusts of Land", 20 Harvard Law Rev., 549.

<sup>17</sup>See "Resulting Trusts and the Statute of Frauds", Professor Harlan F. Stone, 6 Columbia Law Rev., 326.